LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
FEB 7
MICHAEL RODAK, JR.

SUPREME COURT OF THE UNITED STATES

No. 74-984

VIRGINIA MAVER,

Petitioner,

vs.

EDWARD J. LOESCH, ET AL.,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

OVID C. LEWIS
Case Western Reserve
Law School
Cleveland, Ohio 44106
Counsel for Petitioner

TABLE OF CONTENTS

Table of Authorities III
Opinions below 2
Jurisdiction 2
Questions presented 3
Statutory provisions involved 4
Statement of Facts 6
Reasons for granting the Writ 11

I. District Judge Green erroneously dismissed Petitioner Maver's claims against Korinek and Loesch for failure to state a claim on which relief can be granted 11

A. Petitioner Maver's complaint stated a valid claim against Respondents Korinek and Loesch for relief based on 42 U.S.C. §1983 and 28 U.S.C. §1343..... 11

B. Petitioner Maver's complaint stated a valid claim against Respondents Korinek and Loesch based on Bivens v. Six Federal Narcotics Agents, 403 U.S. 388 (1971); Bell v. Hood, 327 U.S. 678 (1946); 28 U.S.C. §1331 17

II. District Judge Green erroneously dismissed Petitioner Maver's claim against the City of University Heights for lack of jurisdiction under 28 U.S.C. §1331..... 22

A. Petitioner Maver's claim satisfies the jurisdictional amount requirement of 28 U.S.C. §1331 26

B. The United States Supreme Court has established jurisdiction to sue municipal corporations under 28 U.S.C. §1331 27

C. The United States Supreme Court authorized jurisdiction under 28 U.S.C. §1331 to sue municipal corporations for claims arising out of federal common law. Illinois v. City of Milwaukee, 406 U.S. 91, 98 (1972).. 30

D. Jurisdiction to sue a municipal corporation when its agents violate the Fourth Amendment implements the constitutional policies underlying the Mapp v. Ohio, 367 U.S. 643, 651-53 (1961) Rule 36

Conclusion 38

Appendix 40

Order of the Court of Appeals 40

Order of the Federal District Court... 42

Memorandum of the Federal District Court 43

Plaintiff's Complaint 49

TABLE OF CONTENTS

Cases

Bell v. Hood, 327 U.S. 678 (1946)..... 3, 17, 20, 21, 22, 30, 31, 35, 38

Bivens v. Six Federal Narcotics Agents, 403 U.S. 388 (1971)..... 3, 17, 18 19, 20, 21, 22, 23, 24, 20, 31, 32, 35, 36, 37, 38

City of Kenosha, Wisconsin v. Bruno, 412 U.S. 507 (1973)..... 4, 9, 21, 24, 27, 28, 29, 30, 35, 38

Edelman v. Jordan, 415 U.S. 651 (1974) 32

Hamilton v. Rathbone, 175 U.S. 414 (1899) 25

Illinois v. City of Milwaukee, 406 U.S. 91 (1972)... 4, 30, 32, 33, 34, 35, 38

Ivy Broadcasting v. American Tel. and Tel. Co., 390 F. 2d 486 (2nd Cir. 1968) 33

Mapp v. Ohio, 367 U.S. 643 (1961)..... 4, 36, 38

Monroe v. Pape, 365 U.S. 167 (1961) 4,11

Moor v. County of Alameda, 411 U.S. 693 (1973) 9,23

Parden v. Terminal Railway of Alabama, 377 U.S. 184 (1964) 32

Scheuer v. Rhodes, 416 U.S. 232 (1974) 3,11,14,15,16,17,18,38

Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) 25

Sturgis v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819) 25

Romero v. International Terminal Operating Comp., 358 U.S. 354 32,33

Fourth Amendment 18

28 U.S.C. §1331 ..... 3, 4, 9, 17, 20
21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 33, 34, 35

28 U.S.C. §1343 ..... 3, 5
9, 11, 12, 13, 21, 22, 23, 24, 27, 28

28 U.S.C. §1983 ..... 3, 5
9, 11, 12, 13, 14, 15, 16, 17, 21, 22, 24, 27, 38

Sources

Hart and Wechsler, The Federal Courts and the Federal System (Ed. 1973) 12

1 Moore's Manual: Federal Practice and Procedure, §508 (1973) 26

Wright, Law of Federal Courts, (Ed. 1970) 32

SUPREME COURT OF THE UNITED STATES

No.

VIRGINIA MAVER,

Petitioner,

vs.

EDWARD J. LOESCH, ET AL.,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

Petitioner Virginia Maver respectfully prays that a writ of certiorari issue to review the order of November 15, 1974, of the United States Court of Appeals for the Sixth Circuit affirming the Order of the United States District Court for the Northern District of Ohio dismissing petitioner's complaint for damages against certain municipal officials arising from their violation of petitioner's Fourth Amendment rights.

OPINIONS BELOW

The order of the District Court setting forth its reasons for dismissing petitioner's complaint is not reported but it is set forth in the appendix hereto.

The order of the Court of Appeals affirming the District Court's order is not reported but is set forth in the appendix hereto.

JURISDICTION

The order of the Court of Appeals was dated and entered by the Clerk on November 15, 1974. Title 28 U.S.C. §1254(1) gives this Court jurisdiction to review such orders by writ of certiorari.

QUESTIONS PRESENTED

1. Where a plaintiff's complaint alleges that municipal housing officials maliciously and wantonly intruded upon her residential privacy without a valid search warrant, has that plaintiff stated a cause of action sufficient with the Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) standard?

   a. Does such a complaint allege a substantive cause of action based on 42 U.S.C. §1983, with jurisdiction properly founded on 28 U.S.C. §1343?

   b. Does such a complaint allege a substantive cause of action based on the Fourth Amendment, Bivens v. Six Federal Narcotics Agents, 403 U.S. 388 (1971), with jurisdiction properly founded upon Bell v. Hood, 327 U.S. 678 (1946), and 28 U.S.C. §1331 where the complaint also alleges over $10,000 in damages?

2. Where a substantive cause of action is properly alleged under the Fourth Amendment, Bivens v. Six Federal Narcotics Agents, 403 U.S. 388 (1971), Bell v. Hood, 327 U.S. 678 (1946), and 28 U.S.C. §1331 against agents of a municipal corporation, can the municipal corporation be held vicariously liable?

a. Has the United States Supreme Court established jurisdiction to sue municipalities for constitutional violations in the case of City of Kenosha, Wisconsin v. Bruno, 412 U.S. 507 (1973)?

b. Has the United States Supreme Court authorized jurisdiction under 28 U.S.C. §1331 to sue municipalities for claims arising out of federal common law in the case of Illinois v. City of Milwaukee, 406 U.S. 91, 98 (1972)?

c. Is jurisdiction to sue a municipal corporation when its agents violate the Fourth Amendment necessary in order to implement the constitutional policies underlying Mapp v. Ohio, 367 U.S. 651-53 (1961)?

STATUTES INVOLVED

28 U.S.C. §1331(a):

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum of value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

28 U.S.C. §1343(3):

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . . . . .
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF FACTS

On Tuesday, January 15, 1974, at approximately 11:30 A.M., Respondent John D. Korinek, a building inspector for the City of University Heights, entered the home of Petitioner Virginia Maver, 3777 Hillbrook Road, University Heights, Ohio. Respondent Korinek was accompanied by a Mr. Grant, who is a University Heights policeman. Both of these officials entered the Petitioner's home under color of state law, allegedly to carry out a housing inspection to detect violations of the University Heights Housing Code. Mr. Grant produced a search warrant signed by Judge Manuel M. Rocker, Shaker Heights Municipal Court, which alleged probable cause in the following statement:

". . . because of evidence of violations and defects discovered in other dwellings in the neighborhood, affiant believes that entrance to said dwelling house is necessary in order to inspect same for hazardous or deteriorating conditions and in order to properly enforce the Housing Code of the City of University Heights." (Appendix, pp. 51-52). This warrant was obtained by Respondent Edward J. Loesch, Commissioner of Buildings of University Heights, and used by Respondent John D. Korinek to obtain entry to Petitioner Maver's home. When Petitioner refused entry to her home to Respondent Korinek, Mr. Grant grabbed

her in the doorway and pushed her aside. When Petitioner attempted to move to the center hall, Mr. Grant again shoved her telling her that he was there to see that the Respondent inspector could do his job. Respondent Korinek immediately entered the Petitioner's home with a wanton and reckless disregard of the legal and constitutional rights of Petitioner Maver. This illegal entry occurred at the direction of Respondent Loesch and the Law Department of the Respondent City of University Heights, a municipal corporation. Inspector Korinek proceeded to search the basement and the first floor in spite of the fact that Petitioner continuously informed him that she strenuously objected to this coerced inspection. When Mrs. Maver refused to permit him to search the second floor of her home where the bedrooms were located, Mr. Grant asked Inspector Korinek if it was necessary to penetrate that sector of the house. He responded, "forget it, I've got enough violations already." (Appendix, p. 5[illegible]). On leaving Petitioner's home, Inspector Korinek stated to Mrs. Maver, "thanks for your hospitality."

Shortly thereafter, Petitioner filed a civil action in the United States District Court for the Northern District of Ohio against Respondents Korinek, Loesch, and the City of University Heights, C 74-59

(Judge Green). The facts surrounding the incident were recited in the Petitioner's complaint. The Petitioner also alleged that the search warrant was defective on its face for failure to set forth sufficient probable cause to justify an intrusion into Petitioner's home. Petitioner alleged that the indignity of this illegal coercive search of her home and the resulting physical assault upon her person inflicted great mental anguish, humiliation and physical suffering on her.

Paragraph 8 of the Petitioner's complaint alleged that the defendants entered her home with a "wanton and reckless disregard of the legal and constitutional rights of plaintiff Virginia Maver," and that the defendants ". . . did maliciously, wrongfully and without legal justification, purposefully enter the plaintiff's home to carry out an extensive investigation therein to harass the plaintiff." (Appendix, p. 5a). Petitioner's complaint demanded judgment against all three respondents jointly and severally for the sum of $5,000 compensatory damages and $10,000 punitive damages along with costs and reasonable attorney's fees. Jurisdiction for a damage award was sought against all three Respondents under the Fourth and Fourteenth Amendments to the United States Constitution and 28 U.S.C. §1331. In addition, jurisdiction was sought against Respondents Korinek and Loesch under the Fourth and

Fourteenth Amendments to the United States Constitution, 42 U.S.C. §1983 and 28 U.S.C. §1343.

Respondents submitted a motion to dismiss the Petitioner's complaint for lack of subject matter jurisdiction and failure to state a claim on which relief could be granted. On May 20, 1974, District Judge Green granted the Respondents' motion with respect to jurisdiction over City of University Heights.

> "As to the City of University Heights it is clear that the municiplaity is not a 'person' subject to suit for alleged deprivations of constitutional rights under 42 U.S.C. §1983. Moor v. City of Alameda, 411 U.S. 693(1973). City of Kenosha v. Bruno, 412 U.S. 507 (1973). The allegation of the general jurisdiction statutes 28 U.S.C. §§1331, 1343 does not create such jurisdiction." (Appendix, p. 46)

District Judge Green also granted the motion to dismiss for failure to state a claim with respect to Respondent Korinek stating:

> "With regard to defendant Korinek his claim of right to entry into plaintiff's residence was based upon a prima facie valid search warrant executed in conjunction with a muni-

> cipal inspection program established by ordinance. That being so, plaintiff's refusal to permit entry was contrary to the said defendant's apparent lawful authority.
>
> . . . . . .
>
> "Defendant Korinek is not alleged to have been the individual who touched plaintiff. He, therefore, can not be held responsible under any theory of assault arising from the occurrence. Furthermore it does not appear from the complaint that the police officer used unreasonable force under the circumstances so that even assuming that there was some agency between the two men . . . no liability would arise from his acts." (Emphasis added.) (Appendix, pp. 50-51)

Since Respondent Loesch's alleged liability was derived from Korinek's liability, Judge Green concluded that no claim had been stated against Loesch.

Since Respondent Loesch's alleged liability was derived from Korinek's liability, Judge Green concluded that no claim had been stated against Loesch. The United States Court of Appeals for the Sixth Circuit affirmed the decision of District Judge Green in a one para-

graph order. (Appendix, p. 4a). Petitioner Maver currently seeks certiorari review of the Sixth Circuit's order by the United States Supreme Court.

REASONS FOR GRANTING THE WRIT

1. District Judge Green erroneously dismissed Petitioner Maver's claims against Korinek and Loesch for failure to state a claim on which relief can be granted.

A. Petitioner Maver's complaint stated a valid claim against Respondent Korinek and Loesch for relief based on 42 U.S.C. §1983 and 28 U.S.C. §1343.

As to Respondents Korinek and Loesch, it "can hardly be argued, at this late date, that under no circumstances can officers of state government be subject to liability under this statute [42 U.S.C. §1983]." Scheuer v. Rhodes, 416 U.S. 232, 243 (1974). The Court in Scheuer went on to state,

> "In Monroe v. Pape, 365 U.S. 167 (1961), Mr. Justice Douglas, writing for the Court, held that the section [§1983)]. . .was meant 'to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of postion. . . ." Scheuer, at 243.

Petitioner Maver's complaint alleged that her Fourth Amendment right to security from illegal searches was violated by Respondents Korinek and Loesch, and that both municipal officials were acting under color of local ordinance when they violated Mrs. Maver's rights. Title 42 U.S.C. §1983 grants a substantive cause of action for damages against "every person who, under color of any . . . ordinance . . . of any state . . . subjects . . . any citizen . . . to the deprivation of any rights secured by the Constitution . . ." See also Hart and Wechsler, The Federal Courts and the Federal System, p. 961 (1973). Title 28 U.S.C. §1343(3) provides jurisdiction for such a suit.[1] Mrs. Maver alleged that the search warrant employed to coerce the non-consensual search of her home was deficient because it failed to state sufficient probable cause to justify the entry. District Judge Green never determined that the search warrant actually stated sufficient probable cause to justify the inspection of the Maver residence. Judge Green held only that the allegations in the Petitioner's complaint were not sufficient to establish a cause of action against Respondents Korinek and Loesch for damages based on the Fourth Amendment violation. Judge Green theorized that the

---

[1] See "Statutory Provisions Involved" section of this Petition, supra at 3.

municipal officials who wrongfully intruded upon plaintiff's privacy were acting within their "apparent lawful authority." (Appendix, p. 47). The District Court reached this conclusion in spite of the defendants' failure to challenge plaintiff's allegation of the invalidity of the search warrant. Judge Green fashions a novel theory of apparent lawful authority with respect to the Fourth Amendment. Under his theory a coerced invasion of the privacy of a person's home via a warrant obtained with no showing of valid probable cause to justify the magistrate's issuance of the warrant generates no constitutionally cognizable violation under §1983.

Of course, there is no concept of "apparent lawful authority" which can constitutionally immunize an illegal search and seizure from scrutiny under §1983 and §1343(3), when the illegality lies in the warrant's failure to properly demonstrate probable cause. Judge Green's theory is clearly wrong because it would eliminate the constitutional requirement that the government establish probable cause before breaching the privacy of a citizen's home. Therefore, the plaintiff's allegations of a Fourth Amendment violation by Messrs. Korinek and Loesch do establish a constitutional violation sufficient to state a claim under §1983 and §1343(3).

In the recent Scheuer case the United States Supreme Court affirmed the potential liability of state officers who violate the constitutional rights of citizens; the Court also articulated the appropriate standard to be applied when a motion to dismiss challenges a plaintiff's complaint for failure to state a claim under §1983. In reversing the Sixth Circuit, the Scheuer Court wrote,

> "When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claim. Indeed, it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader."
>
> "[I]n apprising the sufficiency of the complaint we follow, of course, the

> accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 42, 45, 78 S.Ct. 99, 102, 2 L.Ed. 2d 80 (1957). (Footnote omitted.)

Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

Since the District Court made no express finding contradicting the Petitioner's allegation that the search of her premises occurred pursuant to a warrant based on a deficient finding of probable cause, Petitioner has stated a §1983 claim sufficient to survive defendants' motion to dismiss within the Scheuer standard. No authority sustains Judge Green's peculiar notion that the wanton injuries caused by defendants' illegal search were sanctioned by the defendants' "apparent lawful authority" arising from a search warrant which was based upon an improper finding of probable cause. Therefore this theory cannot vitiate the validity of plaintiff's §1983 claim against Respondents Korinek and Loesch.

Petitioner requests the United States

Supreme Court to grant certiorari in order to review the important federal question of the Sixth Circuit's continued failure to enforce the Scheuer standard with respect to Motions to Dismiss §1983 complaints against state officials. If the Supreme Court grants certiorari and reverses the Sixth Circuit as it did in Scheuer, then Mrs. Maver will receive her first opportunity to prove at trial the malicious, reckless and wanton character of the individual respondent's invasion of her Fourth Amendment rights. To date, Mrs. Maver has been wrongfully denied an opportunity to offer her evidence as proof of the pattern of bad faith harassment by the defendants which she has alleged in her complaint.

In light of the Sixth Circuit's stubborn refusal to apply the proper standard to motions to dismiss §1983 complaints against state officials, the United States Supreme Court must exercise its supervisory authority to again impose the Scheuer standard. Without rigorous enforcement of the Scheuer standard by the Supreme Court the availability of §1983 as a remedy for infringement of constitutional rights by state officials within the Sixth Circuit's purview will be extinguished because valid §1983 complaints will continue to be halted short of proof by improperly granted motions to dismiss.

Because the Maver case was improperly dismissed for failure, the complaint to state a §1983 claim against the individual municipal officials, which dismissal was improperly affirmed by the Sixth Circuit--in violation of Scheuer--the Maver case offers the United States Supreme Court the perfect vehicle for reminding the Sixth Circuit of its responsibility to apply the Scheuer standard to motions to dismiss §1983 complaints. Petitioner Maver therefore requests that this Court grant certiorari and reverse the Circuit Court's order affirming the District Court's dismissal of Mrs. Maver's §1983 claim against Inspector Korinek and Commissioner Loesch.

B. Petitioner Maver's complaint stated a valid claim against Korinek and Loesch based on Bivens v. Six Federal Narcotics Agents, 403 U.S. 388 (1971); Bell v. Hood, 327 U.S. 678 (1946); 28 U.S.C. §1331.

As recited in Part (1(A) of this Petition, the Respondents maliciously searched the Maver residence without a valid search warrant, thus violating Mrs. Maver's Fourth Amendment rights. The Court below made no finding that the search warrant properly stated probable cause sufficient to justify the search and the defendants made no such allegation in their Motion to Dismiss. For purposes of

adjudicating the Motion to Dismiss the District Court was required under Scheuer, supra, standard to assume the validity of plaintiff's allegations regarding the insufficiency of the warrant and the fact of the consequential Fourth Amendment violation. The Fourth Amendment pertinently provides,

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated. . ."[2]

In Bivens v. Six Federal Narcotics Agents, 403 U.S. 388 (1971) the United States Supreme Court construed this constitutional language as fashioning an implied private right of action for damages caused solely by a violation of the Fourth Amendment. In fashioning this substantive cause of action, the United States Supreme Court reasoned,

> "That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. Historically,

---

2 This same language was quoted and construed in Bivens v. Six Federal Narcotics Agents, 403 U.S. 388, 389 (1971).

> damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty . . . The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury t rough a particular remedial mechanism normally available in the federal courts. Cf. J. I. Case v. Borak . . . 'The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury.' Marbury v. Madison . . . Having concluded that the petitioner's complaint states a cause of action under the Fourth Amendment we hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents violation of the Amendment."

Bivens, 403 U.S. at 395-97. (Emphasis added.)

The Bivens Court found federal jurisdiction for the Fourth Amendment's implied private right of action to be validly invoked

under 28 U.S.C. §1331. The Bivens Court quotes from Bell v. Hood, 327 U.S. 678 (1946):

> "Of course the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation. But, 'it is . . . well settled that where legal rights have been invaded and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.' Bell v. Hood, 327 at 684 . . ."

Bivens, 403 U.S., at 396.

Since the Bivens Court construed the exact language of the Fourth Amendment, which is equally applicable to federal and state authorities, Commissioner Loesch and Inspector Korinek cannot escape liability under Bivens merely because that case involved federal defendants.

Since the Petitioner's complaint stated a cause of action against Respondents Korinek and Loesch based on the Fourth Amendment, Bivens, Bell v. Hood, and §1331, the District Court's granting of the Motion to Dismiss for

failure to state a claim respecting these two defendants was erroneous. Consequently, the Sixth Circuit's affirmance of the District Court's dismissal is also erroneous. If the constitutional status of the private right of action which the Bivens Court held to be implied in the language of the Fourth Amendment is to be universally recognized the United States Supreme Court must apply Bivens to a suit for damages against state officials. In fact, such an application appears to have been invited by the Supreme Court's approach in City of Kenosha, Wisconsin v. Bruno, 412 U.S. 507 (1973). (See discussion of jurisdiction against the City of University Heights in Part II of this Petition.) At the very least, the Supreme Court's holding in Bivens creates doubt regarding whether state officials who violate Fourth Amendment rights are subject to two discrete causes of action--one based on §1983 and §1343, and another based on the Fourth Amendment, Bivens, Bell v. Hood and §1331--or whether only one cause of action arises out of a state official's Fourth Amendment violation. This lack of clarity regarding citizens' Fourth Amendment rights and state officials' Fourth Amendment liabilities presents an important federal question which the Supreme Court must clarify. Since both causes of action have been pleaded in this case, the Maver

case offers the Supreme Court a unique opportunity to contour the respective parameters of each discrete cause of action. Therefore, Petitioner Maver requests this Court to grant certiorari to review the question of whether the Fourth Amendment, Bivens, Bell v. Hood, and §1331 create a constitutional implied private right of action parallel to §1983 against state officials who violate citizens' Fourth Amendment rights.

II. District Judge Green erroneously dismissed Petitioner Maver's claim against the City of University Heights for lack of jurisdiction under 28 U.S.C. §1331.

With respect to the City of University Heights, Petitioner Maver agrees with the District Court's holding that this municipal corporation is not a "person" within the meaning of 28 U.S.C. §1343(3) and,thus, no jurisdiction exists for a suit against the City based upon that statute. Therefore, any liability of the Respondent Municipality derived from the invasion of Mrs. Maver's rights by Commissioner Loesch or Inspector Korinek--based on an agency or vicarious liability theory--is not currently cognizable in federal court if either;

1. The substantive cause of action is based on §1983; or

2. Jurisdiction is invoked under §1343.

This is the proper result given the holding of Moor v. County of Alameda, 411 U.S. 693, Parts I and II (1973).[3]

However, Parts I and II of County of Alameda are irrelevant to Petitioner's substantive claim and jurisdictional allegations with respect to the City of University Heights. Petitioner alleged a §1983 cause of action and jurisdiction based on §1343 only with respect to defendants Korinek and Loesch.

Petitioner Maver alleges a second additional and discrete cause of action arising out of the same Fourth Amendment violation. This second cause of action is predicated upon judicially developed federal common law. It arises out of the Supreme Court's recognition of an implied private right of action based on the bare language of the Fourth Amendment in Bivens v. Six Federal Narcotics Agents, 403 U.S. 388 (1971); (see discussion of Korinek's and Loesch's liability in Part I-B of this Petition, supra). Jurisdiction against the City of University Heights for this Fourth

---

[3] See Judge Green's opinion the Maver case (Appendix, p. 46).

Amendment damage claim is predicated on the same jurisdictional statute that was employed in the Bivens case, 28 U.S.C. §1331:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution laws, or treaties of the United States."

A reading of §1331 reveals that unlike §§1983 and 1343, there is no ambiguous term such as "person"[4] which permits a limiting construction of the statute. Where a

[4] The fact that a municipality is not a "person" for §1983 and §1343 purposes has been held to be the only blockade to the liability of municipal corporations for constitutional, violations by their agents. Thus, in Hines v. D'Artois, 43 U.S.L.W. 2056 (Aug. 1974), the United States District Court for the Western District of Louisiana held that a municipality could be liable for racially discriminatory police hiring practices under §1981 because that statute did not predicate liability on whether or not the defendant was a "person." The District Court cited Kenosha v. Bruno, 412 U.S. 507 (1973) as authority.

legislative enactment, such as, 28 U.S.C. §1331 has a plain meaning, there is no need--or justification--to resort to legislative history. The plain meaning rule was clearly articulated in Hamilton v. Rathbone, 175 U.S. 414 (1899).

> "Where a statute is of doubtful meaning and susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances and the purpose intended to be accomplished by it, to determine its proper construction. But, where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it . . . The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be referred to solve but not to create an ambiguity." Hamilton at 421. See also Sturgis v. Crowninshield, 17 U.S. (4 Wheat.) 122, 202 (1819); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951).

A. Petitioner Maver's claim satisfies the jurisdictional amount requirement of 28 U.S.C. §1331.

The trial judge made no finding that Petitioner's complaint failed to satisfy the requisite jurisdictional amount for a §1331 claim. The $10,000 requirement is always a preliminary question when jurisdiction is invoked under §1331. Dismissal predicated on lack of the jurisdictional amount requires that it "appear to a legal certainty that the claim is really for less than the jurisdictional amount, or that the plaintiff never was entitled to recover the amount claimed." 1 Moore's Manual: Federal Practice and Procedure §508, p. 263 (1973). The Petitioner's complaint alleges that the Respondent City's Agent, John D. Korinek, entered her home "with a wanton and reckless disregard" of her constitutional rights. The complaint also alleges that Inspector Korinek entered under the direction of Respondent Edward J. Loesch and the Law Department of the defendant city "maliciously, wrongfully and without legal justification," and did so "purposefully" and "to harass the defendant." (Appendix, p. 55) These allegations lay the foundation for the potential recovery of exemplary, punitive damages well in excess of the requisite jurisdictional amount. Thus, the trial judge

was corre when he implicitly found that the requisite jurisdictional amount was properly alleged.

B. The United States Supreme Court has established jurisdiction to sue municipal corporations under 28 U.S.C. §1331.

In City of Kenosha, Wisconsin v. Bruno, 412 U.S. 507 (1973) the United States Supreme Court invited the same approach to municipal corporations' liability for violations of citizens' constitutional rights by a municipality's agents that was embodied in Mrs. Maver's complaint. In Kenosha, the appellee brought a declaratory and injunctive action against the Wisconsin municipalities of Racine and Kenosha for alleged deprivations of procedural due process in terminating the plaintiff's liquor licenses. The municipalities were the only defendants named in the complaint. While the Supreme Court held that no jurisdiction could be predicated on §1983 or §1343, because the municipal corporations were not "persons" within the meaning of those statutes, the High Court remanded the case to the District Court for a finding of fact regarding whether the claim satisfied the dollar amount necessary to predicate jurisdiction on 28 U.S.C. §1331. The majority, per Justice Rhenquist, wrote,

"The District Court also observed that 'were not civil rights jurisdiction proper, each of the plaintiffs herein would be able to assert the necessary controversy requirement of Title 28 U.S.C. §1331.' But, although appellees in the Racine denials alleged jurisdiction pursuant to 28 U.S.C. §1331 as well as §1343, and in each complaint there was an allegation of an investment in a tavern of at least $20,000 the defendant municipal corporations answered by putting the appellees to their proof as to the amount in controversy. Since the cases were submitted and decided on cross-motions for summary judgment and stipulations of fact, and no stipulation as to the amount in controversy was filed, we cannot say on this state of record whether or not jurisdiction over the complaints was affirmatively established. See, Hague v. CIO, 307 U.S. 496, 507-508 (1939), and cases therein cited. With respect to Kenosha, there was a stipulation as to jurisdictional amount in the proceedings before the single-judge District Court, and an allegation of the requisite jurisdictional amount in the amended complaint which for the first time challenged the constitutional validity of the Wisconsin statutory licensing scheme. No answer was filed

to the amended complaint prior to the entry to judgment by the District Court.

"We have had the benefit of neither briefs, arguments, nor explicit consideration by the District Court of the jurisdictional questions presented by the intervention of the Attorney General as a party, and the availability of §1331 jurisdiction in view of the state of the record below. We therefore remand the case to the District Court for consideration of these issues." City of Kenosha, at 514.

The language of the majority in City of Kenosha, reaffirms the principle that federal jurisdiction exists to entertain a suit against a municipal corporation, under 28 U.S.C. §1331, provided the complaint clearly demonstrates the presence of the jurisdictional amount. As noted, this Petition at Part II(A) supra, Mrs. Maver's complaint alleged sufficient plausible punitive damages to meet the test for jurisdictional amount.

Justice Brennan's Kenosha concurrence clearly invites the approach taken by Mrs. Maver's complaint when he summarizes the Kenosha majority's position regarding municipalities and §1331:

"Appellees did assert 28 U.S.C. §1331 as an alternative ground of jurisdiction, but I agree with the Court's conclusion that the existence of the requisite amount in controversy is not, on this record, clearly established. If appellees can prove their allegation that at least $10,000 is in controversy, then §1331 jurisdiction is available, Bell v. Hood, 327 U.S. 678 (1946); cf. Bivens v. Six Fed. Narcotics Agents, 403 U.S. 388 (1971), and they are clearly entitled to relief." City of Kenosha, at 516 (Mr. Justice Brennan concurring.)

C. The United States Supreme Court authorized jurisdiction under 28 U.S.C. §1331 to sue municipal corporations for claims arising out of federal common law. Illinois v. City of Milwaukee, 406 U.S. 91, 98 (1972).

In Part I(b) of this Petition, supra, Petitioner Maver set forth her theory of liability against Inspector Korinek and Commissioner Loesch based on an implied private right of action for damages inherent in the Fourth Amendment. This view of the Fourth Amendment was fashioned in Bivens v. Six Federal Narcotics Agents, supra, as part of the federal common law of the Fourth Amendment. Jurisdiction with respect to the individual defendants was properly invoked under

28 U.S.C. §1331. See discussion of Bell v. Hood, supra, this Petition Part I(B). As discussed earlier in Part II of this Petition, Mrs. Maver's claim that the City of University Heights is vicariously liable based on the primary liability of the City's servants pursuant to the implied private right fashioned in Bivens. Furthermore, jurisdiction for this federal common law action against the City is sought only under 28 U.S.C. §1331. It must be admitted that §1331 jurisdiction for a Bivens' claim is appropriate with respect to the individual defendants, Bell v. Hood, supra. It might be suggested that §1331 jurisdiction against the defendant municipal corporation for the Bivens' claim is inappropriate. However, the United States Supreme Court has squarely held that §1331 jurisdiction does lie against a municipal corporation when the substantive claim is predicated upon federal judicially developed common law. [5]

[5] This is not a case where the doctrine of state sovereign immunity can operate to bar a damage recovery against a municipal corporation. In the first place, it is questionable whether the state has any sovereign immunity to extend to a suit like this one. Certainly if the adoption of the Fourteenth Amendments constitutes a consent to liability for violation of all the rights applied to the states through the Fourteenth Amendment, then the states

In Illinois v. City of Milwaukee, 406 U.S. 91, 99-101 (1972) the Supreme Court held that §1331 jurisdiction would lie for a federal common law claim against the Municipal Corporation of Milwaukee, Wisconsin. The unanimous Court in the City of Milwaukee case adopted the analysis of s1331 jurisdiction for federal common law claims articulated by Justice Brennan in his earlier separate opinion in Romero v. International Terminal Operating Co., 358 U.S. 354, 393.

> "The contention cannot be accepted that since petitioner's rights are

---

[5] (continued)
must have waived sovereign immunity with respect to Fourth Amendment--Bivens' claims and therefore have no immunity to extend to municipalities for such suits. See Harvard L. Rev. 956, 961, Wright, Law of Federal Courts, p. 185; Edelman v. Jordan, 415 U.S. 651, 694 note 2 (1974);(Marshall's separate opinion); Cf. Parden v. Terminal Railway of Alabama, 377 U.S. 184 (1964). However, even if the state itself is protected from Bivens suits by sovereign immunity Ohio has waived that immunity with respect to Ohio municipal corporations by already exposing them to various types of claims. See 39 Ohio Jurisprudence 2nd s438; Edelman v. Jordar, 415 U.S. 651, 667 note 12.

> judicially defined, they are not created by the laws . . . of the United States' within the meaning of §1331. . . In another context, that of state law, this Court has recognized that the statutory word 'laws' includes court decisions. The converse situation is presented here in that federal courts have an extensive responsibility of fashioning rules of substantive law . . . These rules are as fully 'laws' of the United States as if they had been enacted by Congress." Romero at 393. Quoted in City of Milwaukee, at 99.

The City of Milwaukee case emphasizes the view that §1331 is designed to afford jurisdiction to a municipality for a federal common law claim. The High Court quotes from an earlier §1331 federal common law jurisdiction opinion by Chief Judge Lumbard in Ivy Broadcasting v. American Tel. & Tel. Co. 391 F. 2d 486, 492 (2d Cir. 1968):

> "We believe that a cause of action similarly 'arises under' federal law if the dispositive issues stated in the complaint require the application of federal common law . . . The word 'laws' in §1331 should be construed to include laws created by federal

> judicial decisions as well as by congressional legislation. The rationale of the 1875 grant of federal question jurisdiction--to insure the availability of a forum designed to minimize the danger of hostility toward, and specially suited to the vindication of, federally created rights--is as applicable to judicially created rights as to rights created by statute." Quoted Authoritatively in City of Milwaukee at 100.

In City of Milwaukee the federal law which gave rise to §1331 jurisdiction against the municipality was merely based on federal judicial construction of federal environmental statutes. The City of Milwaukee court focused on the word "laws" in §1331 to justify the extension federal question jurisdiction against the municipality by holding that its judicial interpretation of various federal environmental statutes constituted "laws" for jurisdictional purposes. If judicial construction of federal statutes can give rise to "laws" sufficient to create §1331 federal question jurisdiction, then judicial construction of an implicit claim predicated on the Fourth Amendment to the Constitution should receive the same jurisdictional status. To hold otherwise produces the odd result that federal question jurisdictional preference is accorded to the vindication of congressionally created rights

while such federal jurisdictional protection is not extended to the more fundamental constitutionally created rights.

The City of Milwaukee case creates §1331 federal question subject matter jursdiction runn.ing against municipal corporations for judicially fashioned federal common law civil actions which "arise under the Constitution, laws, or treaties of the United States." (28 U.S.C. §1331). Since Bivens judicially creates a substantive cause of action for Fourth Amendment violations, the Bivens implied right of action for damages qualifies as judicially fashioned federal common law justifying the extension of §1331 federal question subject matter jurisdiction running against the municipal corporation of University Heights. Petitioner Maver requests that the Supreme Court grant certiorari to definitively determine whether a municipality may be held liable for Fourth Amendment violations based on Bivens, Bell v. Hood, §1331, Milwaukee. The trend of the Supreme Court's decisions, particularly the decision in Kenosha, suggests without clearly stating, that such liability does attach and that federal jurisdiction exists to hear such cases. By tracking this Court's approach in Kenosha Petitioner Maver's complaint furnishes the Supreme Court with an ideal vehicle for clarifying this immunity problem. Further-

more, a definitive decision regarding this species of municipal damage liability will have far reaching impact on the continued necessity of the Mapp exclusionary rule for implementing and making the Fourth Amendment fully meaningful in criminal litigation. Thus, the issues in this case are of transcending importance to the functioning of our constitutional system and this Court should grant certiorari.

D. Jurisdiction to sue a municipal corporation when its agents violate the Fourth Amendment implements the constitutional policies underlying the Mapp v. Ohio, 367 U.S. 643, 651-53 (1961) Rule.

Liability of a city for damages where its agents have violated the constitutional rights of its citizens is especially appropriate in the instant case. The Supreme Court has recognized the difficulty experienced by plaintiffs suing police officers and other state agents who break into their homes unlawfully, Bivens at 412-427 (Mr. Chief Justice Burger's dissent). Indeed, one of the bases for extending the exclusionary rule to the states was the inadequacy of damage suits to deter police from violating the Fourth Amendment's proscription of unreasonable searches and seizures. Mapp v. Ohio, 367 U.S. 643, 651-653 (1961). However, where the city is

vicariously liable we may well expect greater control exerted to avoid expensive damage awards recovered from the city treasury. Where such a potential exists for municipal law enforcement agents, then the exclusionary rule--the unsalutory attribute that the criminal escapes conviction because the constable blunders--would no longer be necessary.

Therefore, the issues embodied in this case are of sufficient magnitude to justify this Court's grant of certiorari. See Bivens v. Six Federal Narcotics Agents, 403 U.S. 388, 412-427 (1971) (Mr. Chief Justice Burger's dissenting opinion).

CONCLUSION

Because the District Court wrongfully dismissed Petitioner Maver's complaint against the City of University Heights, Commissioner Loesch, and Inspector Korinek for failure to state a claim and lack of federal jurisdiction, and because the United States Court of Appeals for the Sixth Circuit summarily affirmed the erroneous opinion of District Judge Green, Petitioner Maver requests that the United States Supreme Court grant certiorari to review and reverse the decision of the lower Federal Courts. Certiorari is necessary to insure Sixth Circuit adherence to the Scheuer standard with respect to motions to dismiss §1983 complaints against state officials in the district courts supervised by the Sixth Circuit and to clarify the liability of state officials and municipal corporations under the United States Supreme Court's decisions in Bivens, Bell v. Hood, Kenosha, and City of Milwaukee. Furthermore, careful scrutiny of this second problem may furnish a salutory alternative to the Mapp exclusionary rule for making Fourth Amendment rights fully meaningful.

Respectfully submitted,

Ovid C. Lewis

OVID C. LEWIS
Case Western Reserve
Law School
11075 East Boulevard
Cleveland, Ohio 44106

COUNSEL FOR PETITIONER

APPENDIX

JUDGMENT OF THE COURT OF APPEALS
(Filed November 15, 1974)

No. 74-1729

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

VIRGINIA MAVER,
Plaintiff-Appellant,

vs.

EDWARD J. LOESCH, ET AL.,
Defendants-Appellees

ORDER

Before: PHILLIPS, Chief Judge, PECK, Circuit Judge, CECIL, Senior Circuit Judge.

This matter having come on to be considered on the record on appeal and on the briefs and oral arguments of counsel for the parties, and the Court being fully advised in the premise having concluded that for the reasons

set forth in the Memorandum filed by District Judge Ben C. Green the complaint filed in the district court was not improperly dismissed, and accordingly;

IT IS ORDERED that the judgment of the district court be and it hereby is affirmed.

ENTERED BY ORDER
OF THE COURT

/s/ _____
John P. Herman
Clerk

APPENDIX

ORDER OF THE DISTRICT COURT
(Filed May 20, 1974)

No. C74-59

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

VIRGINIA MAVER

Plaintiff,

v.

EDWARD J. LOESCH, ET AL.,

Defendants.

ORDER

UPON CONSIDERATION of defendants' motion to dismiss the plaintiff's complaint,

IT IS HEREBY ORDERED that the said motion is granted; see this Court's memorandum of even date.

/s/ _____
BENJAMIN GREEN
United States District Judge

APPENDIX

ORDER OF THE DISTRICT COURT
(Filed May 20, 1974)

No. C74-59

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

VIRGINIA MAVER

Plaintiff

v.

EDWARD J. LOESCH, ET AL.,

Defendants.

MEMORANDUM

GREEN, J.:

The named defendants in this action are the City of University Heights, Edward J. Loesch, Commissioner of Buildings, and John D. Korinek. Jurisdiction is alleged under 28 U.S.C. §§1331 and 1343. The plaintiff's substantive claim is

alleged under 28 U.S.C. §§1331 and 1343. The plaintiff's substantive claim is alleged to arise under 42 U.S.C. §1983 and "the Fourth Amendment of the United States Constitution as made applicable to the state through the Fourteenth Amendment of the United States Constitution [and] the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

The factual basis for the action, as set out in the complaint, is as follows:

On Tuesday, January 15, 1974, defendant Korinek, in the company of a University Heights policeman, arrived at the Maver residence, "allegedly to carry out a routine housing inspection pursuant to the University Heights Inspection Ordinance, section 1403.01 et seq." The police officer had a search warrant for the Maver premises, signed by Judge Manuel M. Rocker of the Shaker Heights Municipal Court. The warrant had been obtained by defendant Loesch to be used by defendant Korinek to obtain entry to plaintiff's home.

The complaint alleges that "this warrant was defective on its face for failure to set forth sufficient probable cause to justify an intrusion into plaintiff's home. No challenge is raised as to the constitutionality of the municipal ordinance under which the housing inspection was being carried out.

The police officer produced the search warrant for plaintiff. Nevertheless, plaintiff refused entry to Mr. Korinek. It is alleged that thereupon:

> ". . . Mr. Grant [the police officer] placed his hands on the plaintiff and pushed her aside from the door. When plaintiff attempted to move to the center of the hall by the door Mr. Grant again grabbed hold of her telling her that he was there to see that the inspector did his job.
>
> * * * *
>
> Plaintiff informed defendant John D. Korinek that she was not ready for an inspection. Defendant Korinek nonetheless went through the basement and first floor.

The complaint further alleges:

> Defendant John D. Korinek entered the plaintiff's home with a wanton and reckless disregard of the legal and constitutional rights of plaintiff Virginia Maver. The defendant, under direction from Edward J. Loesch and the law department of the defendant, City of University Heights, did maliciously, wrongfully and without legal justification, purposefully enter the plaintiff's home to carry out an

intensive investigation to harass the plaintiff."

For the "great mental anguish, humiliation, and physical suffering" inflicted on plaintiff as a consequence of "the indignity of this inspection, invasion of privacy, and physical assault," recovery is sought in the sum of $5,000.00 compensatory damages and $10,000.00 punitive damages, plus costs and reasonable counsel fee.

There is presently a motion to dismiss the complaint on behalf of all defendants. The motion asserts lack of subject matter jurisdiction and failure to state a claim for relief.

As to the City of University Heights, it is clear that the municipality is not a "person" subject to suit for alleged deprivation of constitutional rights under 42 U.S.C. §1983. Moor v. City of Alameda, 411 U.S. 693 (1973); City of Kenosha v. Bruno, 412 U.S. 507 (1973). The allegation of the general jurisdictional statutes, 18 U.S.C. §§1331, 1343, does not create such jurisdiction.

With regard to defendant Korinek, his claim of right to entry into plaintiff's residence was based upon a prima facie valid search warrant executed in conjunction with a municipal inspection program established by ordinance. That being so, plaintiff's refusal

to permit entry was contrary to the said defendant's apparent lawful authority.

The doorway to plaintiff's residence was not the proper place to challenge the sufficiency of the affidavit underlying the warrant. To hold otherwise would be to recognize the doorway to every residence as a quasi-judicial forum. While a person's home may be his,or in this case,her castle, it is not an impregnable fortress from which the occupant may bar civil authorities appearing under a facially valid claim of right.

Defendant Korinek is not alleged to have been the individual who touched plaintiff. He, therefore, cannot be held responsible under any theory of assault arising from the occurrence. Further, it does not appear from the complaint that the police officer used unreasonable force under the circumstances, so that, even assuming that there was some agency between the two men (which is not alleged in the complaint), no liability would arise from his acts.

Based on the foregoing, it follows that the plaintiff's complaint fails to state a claim for relief against defendant Korinek.

As defendant Loesch's alleged liability is derivative of that of defendant Korinek,

the complaint must fail as to him also.

Defendants' motion to dismiss the complaint is granted.

/s/ BENJAMIN GREEN
United States
District Judge

APPENDIX

PLAINTIFF'S COMPLAINT
(Filed January 22, 1974)

No. C74-59

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

VIRGINIA MAVER,

Plaintiff,

vs.

EDWARD J. LOESCH
Commissioner of Buildings
2300 Warrensville Center Rd.
University Heights, Ohio 44118

JOHN D. KORINEK
Building Inspector
2300 Warrensville Center Rd.
University Heights, Ohio 44118
and
THE CITY OF UNIVERSITY HEIGHTS
a municipal corporation
2300 Warrensville Center Road
University Heights, Ohio 44118

Defendants.

COMPLAINT

I. The jurisdiction of this Court is invoked under 28 U.S.C. §1331, this being an action which arises under the Constitution and laws of the United States, viz., the Fourth Amendment of the United States Constitution as made applicable to the states through the Fourteenth Amendment of the United States Constitution, the Due Process Clause of the Fourteenth Amendment of the United States Constitution, and section 1983 of Title 42, United States Code, wherein the matter in controversy exceeds, exclusive of interests and costs, the sum of ten thousand dollars ($10,000). The jurisdiction of this Court if further invoked under 28 U.S.C. §1343, this being an action authorized by law to be brought to redress the deprivation under color of statute, regulation, local ordinance, custom and usage of a State of rights, privileges, and immunities secured by the Constitution of the United States, viz., the Fourth Amendment of the United States Constitution as made applicable to the states through the Fourteenth Amendment of the United States Constitution, and the Due Process Clause of the Fourteenth Amendment of the United States Constitution, and of rights secured by laws of the United States, viz., Section 1983 of Title 42, United States Code, all of which hereinafter more fully appears.

2. Defendant, the City of University Heights, is a municipal corporation of Ohio.

3. Defendant, Edward J. Loesch, is the Commissioner of Buildings of University Heights.

4. Defendant, John D. Korinek,is a building Inspector for the City of University Heights.

5. On Tuesday, January 15, 1974, at approximately 11:30 A.M., defendant John D. Korinek and Mr. Grant, a University Heights policeman, under color of state law, entered the home of the plaintiff Mrs. Virginia Maver, 3777 Hillbrook Rd., University Heights, Ohio, allegedly to carry out a routine housing inspection pursuant to the University Heights Housing Inspection Ordinance, section 1403.01 et seq.

6. Mr. Grant produced a search warrant signed by Judge Manuel M. Rocker, Shaker Heights Municipal Court, which alleged probable cause for issuance of a search warrant by stating: "because of evidence of violations and defects discovered in other dwellings in the neighborhood, affaint believes and has good cause to believe that entrance to said dwelling house is necessary in order to inspect same for hazardous or

deteriorating conditions and in order to properly enforce the Housing Code of the City of University Heights." This warrant was obtained by defendant Edward J. Loesch and used by defendant John D. Korinek to obtain entry to plaintiff's home. This warrant was defective on its face for failure to set forth sufficient probable cause to justify an intrusion into plaintiff's home.

7. When plaintiff refused entry to defendant Korinek, Mr. Grant placed his hands on the plaintiff and pushed her aside from the door. When plaintiff attempted to move to the center of the hall by the door Mr. Grant again grabbed hold of her telling her that he was there to see that the inspector did his job.

8. Defendant John D. Korinek entered the plaintiff's home with a wanton and reckless disregard of the legal and constitutional rights of plaintiff Virginia Maver. The defendant, under direction from Edward J. Loesch and the law department of the defendant, City of University Heights, did maliciously, wrongfully and without legal justification, purposefully enter the plaintiff's home to carry out an extensive investigation therein to harass the plaintiff.

9. Plaintiff informed defendant John D. Korinek that she was not ready for an inspection. Defendant Korinek nonetheless

went through the basement and first floor. When the plaintiff refused to permit him to search the second floor of her home, Mr. Grant asked him if it was necessary. Defendant John D. Korinek responded:

> "Forget it, I've got enough violations already."

On leaving, Defendant John D. Korinek stated to the plaintiff:

> "Thanks for your hospitality."

10. The indignity of this inspection, invasion of privacy and physical assault, on the person of the plaintiff did inflict great mental anguish, humiliation and physical suffering on plaintiff. Virginia Maver demands judgment against defendants John D. Korinek, Edward J. Loesch, and the City of University Heights, jointly and severally for the sum of five thousand dollars ($5,000) for compensatory damages and the sum of ten thousand dollars ($10,000) punitive damages, for costs and reasonable counsel fees and for such other relief as is just.

/s/ Ovid C. Lewis
Attorney for Petitioner

SUPREME COURT, U. S.

FILED

APR 22 1975

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

No. 74-984

October Term, 1974

VIRGINIA MAVER,
Petitioner,

vs.

EDWARD J. LOESCH, JOHN D. KORINEK,
CITY OF UNIVERSITY HEIGHTS, OHIO,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

GUERIN L. AVERY, *Director of Law*
2300 Warrensville Center Road
University Heights, Ohio 44118
Telephone: 216-371-4450 or
216-932-7800
Attorney for Respondents

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

In the Supreme Court of the United States

No. 74-984
October Term, 1974

VIRGINIA MAVER,
Petitioner,

vs.

EDWARD J. LOESCH, JOHN D. KORINEK,
CITY OF UNIVERSITY HEIGHTS, OHIO,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OMISSIONS

Respondents accept petitioner's statements of "Opinions Below," "Jurisdiction," and "Statutes Involved" and therefore omits them.

QUESTIONS PRESENTED

1. Where a duly issued search warrant is executed within its scope by a municipal official, may the owner of the property searched establish a cause of action by a bare allegation that a Court erred in the issuance of the warrant?

A. Does such allegation establish jurisdiction under 28 U.S.C. §1343 against the official executing the warrant?

B. Does such allegation create jurisdiction under 28 U.S.C. §1331 for the vicarious liability of the official's employer and supervisor?

C. Does jurisdiction attach as the result of a common law Fourth Amendment violation?

2. Does *Scheuer v. Rhodes* so restrict the ability of a Court to dismiss a case as to be inconsistent with the facts and allegations of this case?

STATEMENT OF FACTS

Except as noted herein, respondents either accept petitioner's statement of facts or consider deviations to be inconsequential.

Respondent Edward J. Loesch obtained a search warrant for the property in question after a City Building Inspector had been refused entry in the ordinary course of a systematic area-wide housing inspection program. The affidavit on which it was based contained no false statements of fact, nor does petitioner claim such to be the case. The scope of the search was well within the authorization of the warrant. No more force was used by the Police officer in restraining the petitioner during the search than was necessary to keep her from attacking or otherwise interfering with the Building Inspector.

Claiming that the facts stated in the search warrant affidavit did not state sufficient cause of its issuance, petitioner demanded both actual and punitive damages in her civil action.

ARGUMENT FOR DENIAL OF PETITION

I. The Decision of the District Court As Affirmed by the Circuit Court Was Correct

Judge Green of the District Court (see Opinion Below, Petition, p. 43) correctly identifies the incident giving rise to petitioner's claim as an improper challenge by petitioner to respondents' legal authority to enter under authority of a prima facie valid search warrant.

Judge Green's opinion referred to the search warrant held by respondent Korinek by the explanatory terms "apparent legal authority," "*prima facie* valid," and "facially valid claim of right" (Petition, pp. 46, 47). His descriptions were apt in light of the legal presumption of validity of a duly issued warrant not obtained by fraud or other such conduct on the part of the officer seeking the warrant's authority. Impliedly, then, he rejected the contention that the executing officer had a responsibility to independently question the issuing Judge's wisdom. Without that contention the cause of action topples.

Petitioner claims that it is respondents' burden to show facts justifying the Municipal Court Judge's issuance of the warrant (Petition, p. 13). There is no such burden. Discretion to decide sufficiency of probable cause belongs solely to the Judge who issues the warrant. His purpose is to review the standard of probable cause so that each officer of the government does not operate on the basis of his own concept thereof. By alleging that an inspector acting under warrant duly issued has the responsibility of passing on its sufficiency himself, petitioner obviates the protective function of the warrant. According to *Brinkman v. Drolesbaugh*, 97 Ohio St. 171, 119 N.E. 451

(1918) an officer working under a warrant duly issued is forbidden from assessing its sufficiency.

> "If the acts complained of be made an offense under the law, and the Court have jurisdiction of such offense, and the process be regular upon its face, it becomes the officer's sworn duty to serve the same and make a return thereon; . . ."

Beyond this, petitioner states no claim on which relief can be granted. Petitioner attempts to *create* a cause that does not exist by bringing in statutory and common law cases which have no reasonable relationship to the facts or issues of the instant case.

In *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 1213 (1961) and *Scheuer v. Rhodes*, 416 U.S. 232, 94 S. Ct. 1683 (1974), petitioners alleged an abuse, by way of overstepping the limits of authority. Mrs. Maver claims no abuse other than that the Municipal Court should not have issued a warrant and, therefore, respondents should not have executed it. Korinek could not, under petitioner's allegations, be liable *as a matter of law*, even if all facts alleged proved to be true.

Since the case against respondents Loesch and the City of University Heights is based on *respondeat superior*, they must be dismissed if the actual actor is not liable. Whether or not a City can be sued under 28 U.S.C. §1331 is not a valid argument against dismissal, for regardless of the answer, there is still no actionable fact on which vicarious liability will lie.

II. Scheuer v. Rhodes Does Not Restrict the District Court from Dismissing the Instant Case

The *Scheuer* opinion, at 416 U.S. 232, 236, adopted *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99 (1957), in its statement:

> "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

Petitioner's interpretation of this would make it virtually impossible for any Court to ever again dismiss a case prior to trial. Petitioner's interpretation is erroneous in two regards:

> A. Whether the search warrant affidavit states probable cause is a question of law, not fact.
>
> B. The phrase "no set of facts" must be limited to facts stated or suggested by the Complaint.

As to the first error in interpretation, petitioner wishes to be able to prove that the facts stated in the search warrant affidavit did not constitute probable cause for a search. She does not challenge the facts themselves but rather the legal conclusion reached by the Municipal Court in applying these facts. That legal conclusion is not itself a "fact" within the meaning of *Conley* or *Scheuer*, and does not exempt the ensuing civil damage action from dismissal if the District Court, *as a matter of law*, rejects petitioner's contentions in regard thereto.

Petitioner's second interpretive error would have her allowed to go to trial to prove "the malicious, reckless

and wanton character of the individual respondent's invasion". . . . (Petition, p. 16). And yet, not one *fact* is alleged in the complaint to support or even suggest such a conclusion.

Admittedly we are in an era of simplified pleading and we further require that amendments to pleadings be liberally allowed to conform to the evidence adduced at trial, that substantial justice may be done. Does *Scheuer* require that trial take place on the off-chance that some evidence not even suggested by pleading will come forth to save the day? If so, *Scheuer* prevents any case from ever being dismissed until after every shred of evidence is in.

In *Scheuer*, there was a definite contention that defendants, having discretion to deploy the National Guard, intentionally abused that discretion. Defendants were dismissed as being protected by the Eleventh Amendment and by absolute immunity. This Court remanded on the basis that the Eleventh Amendment did not apply and that immunity was not absolute but qualified. The facts suggested by the complaint would therefore have to be considered before a Court could properly rule on the immunity question. But it is absurd to believe that this Court would have remanded in the complete absence of the suggestion of those facts.

The instant case is easily and immediately distinguishable in that there is no suggestion that respondent Korinek went beyond the authority of the warrant, assuming as a matter of law that the authority was bestowed on him. No set of facts could bestow discretion upon him and he could not, therefore, under any set of facts, abuse discretion.

CONCLUSION

The District Court rejected petitioner's legal assumptions. Having done so, the facts became irrelevant and immaterial and continuance of the case would have served no plausible useful purpose. The Order of Dismissal was then essential to the interests of justice and should be allowed to stand.

Certiorari will accomplish nothing and should be refused.

Respectfully submitted,

GUERIN L. AVERY, *Director of Law*
2300 Warrensville Center Road
University Heights, Ohio 44118
Telephone: 216-371-4450 or
216-932-7800
Attorney for Respondents